IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 70 OF 2015

TANZANIA WOMEN'S BANK LIMITED ..... PLAINTIFF

VERSUS

WINFRIDA KUNDAUFOO KIMARO
JOAS BILIKWIJA RUGEMALIRA } **..... DEFENDANTS**
MARY GIDEON RUGEMALIRA

30th September & 27th October, 2015

RULING

MWAMBEGELE, J.:

The second and third defendants had filed an application which was christened Miscellaneous Commercial Cause No. 226 of 2015 seeking leave of the court to allow them defend this suit; Commercial Case No. 70 of 2015. Realising that the affidavit in support of the application was not attested to and hence defective, the two defendants, through Ms. Jacqueline Rweyongeza, the learned counsel who held the brief for Mr. Rwehumbiza, learned counsel for the two defendants, sought to withdraw the application. The court granted the prayer and marked the application as withdrawn.

Consequent upon that, Mr. Sanga, the learned counsel who represented the plaintiff, quickly, prayed for summary judgment against the second and third respondents. The prayer was made under Order 68 (c) of the High Court

(Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 (henceforth "the Rules").

Ms. Rweyongeza, learned counsel, objected to the prayer by Mr. Sanga, learned counsel, on the reason that the two defendants will re-file a proper application having shown the interest to defend the suit from the outset.

Ms. Winifrida Kundaufoo Kimaro; the first defendant, who was not represented was also given audience to comment on Mr. Sanga's prayer for summary judgment against the second and third defendants with whom she had been sued jointly and severally. Ms. Kimaro, a lay person, told the court that hers and the second and third defendants' case were the same. In the circumstances, she opined, prudence would require that their fate be decided after her case has been finally heard and decided.

In a short rejoinder, Mr. Sanga, learned counsel for the plaintiff, attacked Ms. Rweyongeza's prayer to re-file the application for leave to defend the summary suit stating that she did not make such a prayer when withdrawing the relevant application. The learned counsel thus reiterated his prayer to have a summary judgment against the second and third defendants.

Let me hasten to state from the outset that the position stated by Ms. Kimaro; a lay person, depicts the correct position of the law. The second and third defendants, having been sued jointly and severally with the first defendant, a summary judgment cannot be entered against them until the suit against the first defendant is finally determined. That this is the law was stated in ***Hathisang Premji Patel Vs Ramji Jethabhai*** (1947) 14 EACA 23. In that case, the appellant Hathisang Ramji Patel had sued the respondent Ramji

Jethabhai and another defendant "jointly and/or severally, or in the alternative jointly and severally". The respondent had not filed a defence for being out of time. The appellant wanted to prove his case against him *exparte*. The Judge refused him leave to do so until he had heard the case against the second defendant who had filed a defence. In dismissing the appellant's prayer, the learned Judge had ordered:

> "I am not prepared to allow the plaintiff to prove *ex parte* against the 1st defendant in the circumstances in view of the defence filed by the 2nd defendant. The case should proceed to hearing when a just order can be made against the 1st defendant ..."

On appeal, the Court of Appeal for Eastern Africa confirmed the learned Judge's order. Quoting from the headnote, the Court of Appeal for Eastern Africa [Before Nihill, C.J. (Kenya), Sir G. Graham Paul, C.J. (Tanganyika), and Edwards, C.J. (Uganda)] held:

> "... the learned Judge had a discretion, which he had rightly exercised, to delay judgment against the respondent until he had heard the case against the second defendant."

It may not be irrelevant to add the following words of Sir G. Graham Paul, the Chief Justice of Tanganyika, in concurring with the judgment of Nihill, President (supra):

> "I concur in the judgment of the learned President and would only add that on the face of the plaint this would appear to be a case where necessarily the learned Judge had to delay judgment as against the first defendant until he had heard the case for the second defendant, the claim being against the defendants 'jointly, and/ or severally, *or in the alternative'*."

I respectfully subscribe to the foregoing position and think it is still good law today. The position of the law is therefore that when two or more defendants are sued jointly and severally, a summary judgment (or default, *exparte* judgment, as the case may be) cannot be entered against one or some of the defendants until the cases of other defendants are fully determined. Thus in the case at hand, a summary judgment cannot be entered against the second and third defendants until the case against the first defendant, with whom they are sued jointly and severally, is finally heard and determined. In the premises, the prayer by Mr. Sanga for summary judgment against the second and third defendants at this stage is refused.

There is also a prayer by Ms. Rweyongeza to allow the second and third defendants file another application for leave to defend the summary suit, the first application having been withdrawn on account of its being incompetent. Mr. Sanga, learned counsel for the plaintiff strenuously objects on account that Ms. Rweyongeza, learned counsel for the second and third respondents did not make such prayer in the first place. I have subjected these rival arguments to the proper scrutiny they deserve. Indeed, as intimated by Ms. Rweyongeza, learned counsel, the reason why she withdrew the application was just because she

realized it to be incompetent for the reasons stated above. I think Ms. Rweyongeza took the right path to withdraw the application, for she could not have ultimately achieved the goal the application intended to. This is because the affidavit purporting to support the application was fatally defective for failure to have it attested before a notary public or commissioner for oaths. Indeed, to call it a defective "affidavit" is a misnomer for I have serious doubts if it deserves that name at all. If anything, it was just a purported defective affidavit.

And Mr. Sanga, quickly and cleverly, chipped in to pray for a summary judgment before Ms. Rweyongeza could express her intentions by making the relevant prayer to the court. The way I see it, I think justice will be left smiling if the second and third respondents are given another chance to make amends of the unfortunate situation.

I therefore would allow the second and third defendants to file another application for leave to defend the summary suit, subject of course, to the prevailing laws on limitation. The process thereof should be commenced in a fortnight from the date of this order. Costs will be in the cause.

Order accordingly.

DATED at DAR ES SALAAM this 27th day of October, 2015.

J. C. M. MWAMBEGELE
JUDGE